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9 *Financial Bank, NA, successor by*
10 *merger with Oak Brook Bank*

7 **IN THE UNITED STATES BANKRUPTCY COURT**
8 **IN AND FOR THE DISTRICT OF ARIZONA**

9 In re:

10 JACK ROBERT SILVERMAN,
11 Debtor.

12 MB FINANCIAL BANK, NA,
13 SUCCESSOR BY MERGER WITH OAK
14 BROOK BANK,

15 Movant,

16 vs.

17 JACK ROBERT SILVERMAN, DEBTOR;
18 AND DALE D. ULRICH, CHAPTER 7
19 TRUSTEE,

20 Respondents.

Chapter 7 Proceedings

Case No.: 2:10-bk-31920-CGC

**MOTION FOR RELIEF
FROM THE AUTOMATIC
BANKRUPTCY STAY**

Re: 2006 Harley Davidson FXDCI

21 MB Financial Bank, NA, successor by merger with Oak Brook Bank, ("Bank"),
22 by and through its undersigned counsel, hereby requests that the Court enter an order
23 terminating any and all stays and injunctions, including the bankruptcy automatic stay
24 of 11 U.S.C. § 362(a), to allow Bank to exercise its state law rights and remedies in and
25 to its collateral which is a 2006 Harley Davidson FXDCI motorcycle identified as VIN
26 #1HD1GV1106K320953(the "Motorcycle") which include taking possession of the
Motorcycle and selling it pursuant to the requirements of the Uniform Commercial

1 Code. This “Motion for Relief from Stay” (“Motion for Relief”) is submitted pursuant
2 to 11 U.S.C. §362(d), Bankruptcy Rule 4001 and Local Bankruptcy Rule 4001-1 and is
3 supported by the following Memorandum of Points and Authorities.

4 RESPECTFULLY SUBMITTED this 10th day of December, 2010.

5 **FOLKS & O’CONNOR, PLLC**

6
7 By /s/ Lisa Kass

8 Larry O. Folks
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merger with Oak Brook Bank

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 1. This Court has jurisdiction over this contested matter pursuant to 28
14 U.S.C. § 1334. The filing of this Motion for Relief commences a contested matter
15 pursuant to Bankruptcy Rule 9014. This Motion for Relief is also submitted to comply
16 with Bankruptcy Rule 4001 and Local Bankruptcy Rule 4001-1.

17 2. On October 4, 2010, (the “Petition Date”), Jack Robert Silverman (the
18 “Debtor”) filed a voluntary petition under Chapter 7 of the United States Bankruptcy
19 Code, 11 U.S.C. §§ 101 *et seq.*

20 3. Hacienda Harley Davidson (“Dealer”), is a retail motorcycle dealership
21 located in Scottsdale, Arizona which is, or was, a party to a Retail Installment Contract
22 and Security Agreement with Bank (the “Dealer Contract Purchase Agreement”). The
23 Dealer Contract Purchase Agreement: (i) authorizes, or authorized, Dealer to enter into
24 retail installment sales contracts to sell motorcycles to Dealer’s customers; (ii) allows,
25 or allowed, Bank, at its option, to finance motorcycles to Dealer’s customers pursuant to
26 such retail installment sales contracts; and (iii) provided, or provides, for Bank to

1 acquire and be assigned any and all of Dealer's rights under any retail installment sales
2 contract entered into with one of its customers concerning which Bank financed the
3 customer's purchase of a motorcycle, including, without limitation, the purchase money
4 security interest granted and pledged to Dealer by such customer in a financed
5 motorcycle.

6 4. On May 5, 2006, Dealer and Borrower entered into a Retail Installment
7 Sale Contract (the "Installment Sale Contract") to finance Borrower's purchase of the
8 Motorcycle that is the subject of this motion. A true and accurate copy of the
9 Installment Sale Contract is attached hereto as Exhibit A and is herein incorporated
10 herein by this reference.

11 5. The Installment Sale Contract serves as, among other things, a promissory
12 note to evidence the indebtedness financed by Bank and owed by Borrower and a
13 security agreement pursuant to which Borrower granted and pledged a purchase money
14 security interest in the Motorcycle to Dealer to secure the indebtedness.

15 6. Bank has perfected its first-priority purchase money lien upon the
16 Motorcycle by noting its purchase money security interest and lien upon the Certificate
17 of Title to the Motorcycle with the Arizona Department of Motor Vehicles. A true and
18 accurate copy of the Certificate of Title issued concerning the Motorcycle which lists
19 the notation of Bank's first-priority purchase money lien upon the Motorcycle is
20 attached hereto as Exhibit B and is herein incorporated by this reference.

21 7. On November 3, 2006, Oak Brook Bank merged with MB Financial Bank.
22 A true and accurate copy of the Merger letter is attached hereto as Exhibit C.

23 8. Debtor has failed to pay his scheduled monthly payments of \$338.67 due
24 under the Installment Sale Contract since September of 2010.

25 9. The unpaid balance of the Note consists of (i) a principal amount of
26 \$8,002.43; (ii) accrued interest of \$313.08 (iii) late charges of \$20.00; (iv) attorneys'

1 fees of \$350.00; and (v) filing costs of \$150.00 for a total pay off amount of \$8,835.51
2 (the "Loan Balance").

3 10. Bankruptcy Code §506(a)(2) provides that in a case under Chapter 7 or
4 13, the value of personal property acquired for personal, family, or household purposes
5 securing an allowed secured claim shall be determined based upon the "replacement
6 value" of such property which shall mean "the price a retail merchant would charge for
7 property of that kind considering the age and condition of the property at the time value
8 is determined". 11 U.S.C. §506(a)(2).

9 11. Bank's estimate of the "replacement value" of the Motorcycle is
10 \$8,615.00. This estimate is based upon the current Black Book "Average Retail Value"
11 of the Motorcycle. In addition, Schedule B of the Debtor's Schedules of Assets and
12 Liabilities filed in this case concede a value of the Motorcycle in the amount of
13 \$15,550.00. A true and accurate copy of Black Book valuation report specific to the
14 Motorcycle which substantiates Bank's estimate of the "replacement value" of the
15 Motorcycle is attached hereto as Exhibit D and is herein incorporated by this reference.

16 12. Bank has not been supplied with any evidence that the Motorcycle is
17 properly insured.

18 13. Bankruptcy Code §362(d)(1) specifically lists **the lack of adequate**
19 **protection** as sufficient **cause** for granting a creditor relief from the automatic stay.
20 Generally, Bankruptcy Courts consider a secured creditor to be adequately protected if
21 an "equity cushion" exists in the subject property. In re Nashau Trust Company, 73 B.R.
22 423, 431 (Bankr. N.J. 1987). An "equity cushion" has been defined as the "value in the
23 property, above the amount owed to the creditor with a secured claim, that will shield
24 that interest from loss due to any decrease in the value of the property during the time
25 the automatic stay remains in effect". In re Mellor, 734 F.2d 1396, 1400 N.2 (9th Cir.
26 1984) *quoting* In re Roane, 8 B.R. 997, 1000 (Bankr. E.D. Pa. 1981), *aff'd*, 14 B.R. 542

1 (E.D. Pa. 1981). Whether there is an “equity cushion” in a particular property is decided
2 on a case-by-case basis. In re Kost, 102 B.R. 829 (Bankr. Wyo. 1989). In addition, as
3 defined by Bankruptcy Code §361, adequate protection may consist of cash payments,
4 additional or replacement liens, or any other relief providing the secured creditor the
5 indubitable equivalent of its interest in the property. 11 U.S.C. §361.

6 14. Because Bank’s Loan Balance and the lien upon the Motorcycle are equal
7 to the “replacement value” of the Motorcycle, no “equity cushion” exists in this case to
8 protect Bank’s interest in the Motorcycle. In fact, Bank contends that it is an
9 undersecured creditor and, as such, it is entitled to adequate protection of its interest in
10 the Motorcycle to the extent that the Motorcycle is declining in value. United Savings
11 Association of Texas, 484 U.S. 365, 108 S.Ct. 626, 630, 98 L.Ed. 2d 740 (1988).

12 15. In this case, the value of the Motorcycle, as a depreciating motor vehicle,
13 is declining in value on a daily basis. Because the Debtor is not making any scheduled
14 monthly payments, any adequate protection payments, nor offering any other form of
15 adequate protection to compensate Bank for said ongoing diminution in value of its lien
16 position, Bank is not being adequately protected and is entitled to relief from the
17 automatic stay for **cause** pursuant to Bankruptcy Code §362(d)(1).

18 16. The Bankruptcy Code does not limit the scope and definition of **cause** that
19 justifies granting a creditor relief from the automatic stay pursuant to Bankruptcy Code
20 §362(d)(1). In fact, bankruptcy judges have significant discretion to grant such relief
21 based upon the facts of a specific case. In re Mac Donald, 755 F.2d 715, 717 (9th Cir.
22 1985); In re Lomas Mortgage USA, 980 F.2d 1270 (9th Cir. 1992); and In re Shirley,
23 134 B.R. 940 (9th Cir. BAP 1992).

24 17. An alternative basis for granting Bank relief from the automatic stay
25 concerning the Motorcycle is Bankruptcy Code §362(d)(2). To obtain relief pursuant to
26 §362(d)(2), there must be **no equity** in the collateral securing the creditor **and** the

1 collateral must not be necessary for an effective reorganization of the debtor. 11 U.S.C.
2 §362(d)(2). In re Sun Valley Newspapers, Inc., 171 B.R. 71, 74 (9th Cir. BAP 1994); La
3 Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 286, 289-290 (Bankr.
4 S.D. Cal. 1982). The debtor bears the burden on all issues except whether equity exists
5 in the collateral securing the creditor. United Savings Assn. of Texas v. Timbers of
6 Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S.Ct. 626, 632, 98 L.Ed.2d 740
7 (1988).

8 18. Bank has also established herein that there is **no equity** in the Motorcycle
9 which serves as its collateral. Therefore, the burden is on the Debtor to demonstrate that
10 the Motorcycle is necessary for an effective reorganization. 11 U.S.C. §362(g).

11 19. WHEREFORE, Bank requests that the Court enter an order terminating
12 any and all stays and injunctions, including the bankruptcy automatic stay of 11 U.S.C.
13 362(a), in its favor with respect to the Motorcycle, to allow Bank to exercise its state
14 law rights and remedies which include taking possession of and selling the Motorcycle
15 pursuant to the requirements of the Uniform Commercial Code.

16 DATED this 10th day of December, 2010.

17 FOLKS & O'CONNOR, PLLC

18 By /s/ Lisa Kass

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22 **ORIGINAL** filed by ECF and
23 **COPIES** of the foregoing mailed
24 this 10th day of December, 2010, to:

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15 By /s/ McKinley Sedig
16 *An Employee of Folks & O'Connor, PLLC*
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